Supreme Court, U.S.
FILED
JUL 9 1992
OFFICE OF THE CLERK

No. 91-1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.,

Petitioner,

v.

CLIFFORD L. ALLENBY; JOHN K. VAN DE KAMP, ESQ.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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JULY 9, 1992

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INTEREST OF *AMICUS CURIAE*

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. CMA member companies are located throughout the United States, and are subject to many federal and State environmental regulations, including those governing the labeling of pesticides and hazardous substances that are involved in this case. The federal and State regulatory structures impact the ability of chemical companies to market their products across the country. The Association is filing this *amicus* brief because of its strong interest in clarifying the effect of federal law on State regulations.

Pursuant to Rule 37.2 of the Rules of this Court, CMA requested and received the written consent of all parties to file this *amicus* brief. The consents of Petitioner and Respondents accompany this brief.

If the Court of Appeals' decision stands, substantial new regulatory authority will effectively be vested in State governments despite the dictates of federal law. The balance created by Congress in shared federal-State authority will be upset under the Ninth Circuit decision.

In addition, the decision exacerbates the impact of multiple State regulations, despite the existence of comprehensive, uniform programs adopted by Congress. The doctrine of federal pre-emption and the very principles of Federalism promote uniformity in those areas, as in this case, that have significant health and safety implications. The Ninth Circuit decision will undermine the purposes and objectives of the federal labeling requirements for pesticides and consumer chemicals.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari because the Ninth Circuit decision upsets the federal-State balance of authority adopted by Congress in federal programs related to environmental, health and safety protection. If the decision stands, Congressional limits on the exercise of State regulatory authority will be undermined, threatening the existence of uniform, comprehensive federal regulatory programs. The Ninth Circuit decision also undercuts this Court's recent decision in *Gade v. National Solid Wastes Management Ass'n*, ____ U.S. ___, 60 U.S.L.W. 4587 (June 18, 1992), and therefore merits the Court's review.

Regardless of the pre-emption category under which this case is analyzed, the clear text of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Federal Hazardous Substances Act (FHSA) pre-empt any state enactment

relating to labeling for pesticides and consumer chemical products. FIFRA and FHSA reflect a Congressional mandate for shared federal-State authority over pesticides and consumer chemicals. The notable exception to that shared power is labeling, where federal law controls exclusively. The effect of the Ninth Circuit decision is to endorse conflicting regulatory results, transferring control over labeling to State governments, contrary to Congressional intent.

The Ninth Circuit decision should also be reviewed by this Court because it conflicts with decisions in other federal Circuit Courts of Appeal. Certiorari should be granted to provide States, the regulated community, and the lower courts guidance on the pre-emption standard applied under FIFRA and FHSA.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECISION HAS A BROAD IMPACT ON FEDERAL ENVIRONMENTAL, HEALTH AND SAFETY LAWS

This case involves an issue that has increasingly occupied the federal courts: pre-emption of State law by federal law. Since January 1, 1989, more than 395 cases raising pre-emption issues have been brought before the Supreme Court and the Courts of Appeal. Although these cases did not all involve the pre-emptive effect of the same statute, the number of cases is testimony to the uncertainties which reign in federal pre-emption analysis. *See Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 60 U.S.L.W. 4703 (June 24, 1992) (Scalia, J., concurring in part and dissenting in part). The Ninth Circuit decision will compound those uncertainties by giving pre-emptive effect only to the most precise, detailed statements of Congressional intent.

A. Background

In 1986, the State of California enacted the Safe Drinking Water and Toxic Substances Act (Proposition 65).[1] The Act requires the State to list substances considered to be carcinogens or reproductive toxins. *Id.* Manufacturers of products containing these substances -- regardless of concentration or actual toxic effect -- are required to provide warnings about the content of the products. *See Pet. for Cert. at 3-5.* Exceptions from the warning requirements are available if the manufacturer can show no risk, under extremely conservative risk and exposure assumptions. Proposition 65 forces manufacturers to provide point-of-sale labeling. *Id.* at 5.

The petitioner, the Chemical Specialties Manufacturers Association (CSMA), brought suit for declaratory judgment, arguing that shelf labeling required under Proposition 65 is pre-empted by the specific language of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* and the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261 *et seq.*. FIFRA and FHSA impose a comprehensive federal precautionary labeling system for pesticides and consumer chemicals, respectively.

The main objectives of the FIFRA and FHSA regulatory schemes are the protection of human health, safety, and the environment. In the area of labeling, the federal government has sole regulatory discretion. As first enacted in 1947, FIFRA was primarily a licensing and labeling statute.

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[1] Because Proposition 65 imposes an undue burden on interstate commerce, CMA filed an action for declaratory judgment seeking federal Occupational Safety and Health Act (OSHA) pre-emption of the workplace warning requirement. *Chemical Manufacturers Ass'n et al. v. Cal. Health and Welfare Agency, et al.*, No. CIVS -88 -1615 LKK-JFM (E.D. Cal.). The case is currently stayed by order of the District Court pending federal OSHA's review of California's state plan amendment purporting to adopt the Proposition 65 workplace requirements.

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984). Due to public concern about the safety of pesticides and their effect on the environment, Congress amended FIFRA several times, transforming it from a simple labeling law into a comprehensive regulatory statute. *Id.* Today, FIFRA is a carefully crafted system of regulatory procedures, substantive rights, and obligations that balances the needs of interstate commerce with the public concern for safety. Having amended the Act five times (1972, 1975, 1978, 1980, 1988) in the last 20 years, Congress has given the structure of the Act careful consideration and reflection.

FIFRA permits State governments to assert jurisdiction over the sale or use of a regulated product. FIFRA § 24(a); 7 U.S.C. § 136v(a). A State's regulatory authority is limited only by an express prohibition on State labeling or packaging requirements "in addition to or different from" the FIFRA requirements. *Id.*, § 24(b); 7 U.S.C. § 136v(b). Labeling, in turn, is defined by FIFRA as "all labels *and all other written, printed or graphic matter*" that accompanies the product at any time or to which some reference is made. *Id.*, § 2(p)(2); 7 U.S.C. § 136(p)(2) (emphasis added).

The U.S. Environmental Protection Agency (EPA) is charged with implementing FIFRA. EPA conducts detailed scientific assessments to determine whether product risk and exposures warrant specific warning language. *See Pet. for Cert. at 10-11.*

Like FIFRA, the FHSA is a comprehensive regulatory statute which vests exclusive authority over labeling of consumer chemicals (except pesticides) with the federal government. Congress' commitment to federal control over labeling was demonstrated six years after enactment of FIFRA. The Act was amended to pre-empt State labeling requirements not identical with federal law but covering the same risks. 15 U.S.C. § 1261 note (b)(1)(A); Pub. L. No. 89-756 § 4(b)(1)(A); 80 Stat. 1305 (1966).

FHSA governs the sale, use, packaging and labeling of consumer chemicals. As in FIFRA, labeling under the FHSA includes material affixed to products or which accompany the product. FHSA § 2(n); 15 U.S.C. § 1261(n). State authority is limited to packaging or use requirements, subject to approval from the federal government. *Id.* § 1261 note (b)(1)(B); Pub. L. 89-756 § 4(b)(1)(B).

The FHSA complements the authority of the Consumer Product Safety Commission (CPSC) to regulate chronic hazards -- like carcinogens -- under the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 *et seq.* Notably, the CPSA also restricts State labeling regulations not identical with CPSC requirements. *Id.*, § 2075. The CPSC is required to conduct comprehensive assessments of the data on chemicals before issuing warning requirements.

B. The Ninth Circuit Decision Undermines Federal Environmental, Health and Safety Law

The Ninth Circuit found that FIFRA and FHSA did not pre-empt Proposition 65 because the required warnings were not "labeling" as that term is used in the federal statutes. *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F. 2d 941 (9th Cir. 1992). This unnecessarily narrow reading of the statutes threatens the fundamental balance of regulatory authority Congress has adopted throughout the major environmental, health and safety laws.

The United States has the most comprehensive system of environmental law in the world. In enacting these laws, Congress sought to reconcile the legitimate police powers of the States with the federal government's interest in environmental protection, public health and safety, and interstate commerce. In virtually every environmental statute there is some provision for State divergence from the Congressionally-established standard, subject however to federal control in the areas most critical to the federal objective. *See, e.g.*, Clean Water Act § 510, 33 U.S.C. 1370 (State effluent limita-

tions); Solid Waste Disposal Act § 9004, 42 U.S.C. § 6991c (State administration of underground storage tank program); Toxic Substances Control Act § 18, 15 U.S.C. § 2617 (conditions for State regulation of toxic substances). The approach is consistent with the Constitutional requirement to give effect to the State's police powers, while maintaining a uniform standard in the areas of national concern (*i.e.*, interstate commerce).

The Ninth Circuit, however, would read Congress' attempts to preclude State regulation with a jaundiced eye. In taking a needlessly narrow view of statutory pre-emption provisions, rather than the statute as a whole, *United States v. Morton*, 467 U.S. 822, 828 (1984), the Ninth Circuit decision has the effect of requiring Congress to speak with a detail that strains the bounds of credulity, if not practicality.

For example, the Clean Water Act prohibits States from adopting or enforcing any effluent limitation that is less stringent than those in effect under the federal program. Clean Water Act § 510, 33 U.S.C. § 1370 (1972). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) (Clean Water Act pre-emption of state common law). The Act further defines effluent limitations as State or federal "restrictions" on amounts discharged to water. *Id.*, § 502(11), 33 U.S.C. § 1362(11). On the face of this provision, the federal standards establish a regulatory minimum. Suppose next that a State determines that the federal standard has had a significant economic impact, and that a lesser effluent limitation would preserve industry and jobs. The State could -- in the guise of economic development -- adopt a lower "discharge rate" for its industry, arguing that the lower rate does not amount to a restriction. This result comports with the narrow approach taken by the Ninth Circuit, yet completely and utterly defeats the clear purpose intended by Congress.

C. The Ninth Circuit Decision Negates This Court's Recent Pre-emption Decision in Gade.

Less than one month ago, the Court held that the federal Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651-678 (1970), pre-empts State enactments which have an impact on federal workplace standards. *Gade v. National Solid Wastes Management Ass'n*, ____ U.S. ___, 60 U.S.L.W. 4587 (June 18, 1992). The State law at issue in *Gade* was arguably consistent with the federal standards, although broader in scope than the federal requirements. The similarities between OSHA and the statutes involved in the present petition suggest that the result in *Gade* will be undermined unless the Court grants certiorari.

Like FIFRA and FHSA, OSHA was intended to impose a degree of federal control in an area subject to multiple, potentially conflicting regulations. OSHA contains, like FIFRA and FHSA, a system of shared federal-State authority over workplace health and safety. As in FIFRA and FHSA, OSHA carefully limits the role of the States in regulating occupational safety and health. State workplace standards on subjects for which a federal standard is in effect are expressly pre-empted, similar to pre-emption under FIFRA and FHSA. A State may assert regulatory authority under OSHA only by adopting a state plan approved by the federal agency, with more stringent State regulations requiring OSHA's express approval, akin to the procedure required under the FHSA. OSHA § 18; 29 U.S.C. § 667.

Under *Gade*, even State standards which supplement the federal statutory objectives and purposes are pre-empted. The Ninth Circuit's narrow construction, read in conjunction with the Court's recent decision in *Cipollone*, ___ U.S.___, 60 U.S.L.W. 4703 (June 24, 1992), could lead to exactly the inconsistent result identified by Justice Scalia:

> If taken seriously, it would mean, for example, that if a federal consumer protection law provides that no state agency or court shall assert jurisdiction under state law over a workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law -- forbidding, for example, the use of certain safety equipment that federal law requires . . . . [T]he result is extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. *Id.* at ___, 60 U.S.L.W. at 4715 (Scalia, J., *concurring* in part and *dissenting* in part) (emphasis in original).

II. CERTIORARI SHOULD BE GRANTED TO PREVENT EROSION OF THE REGULATORY BALANCE ADOPTED BY CONGRESS

A. Proposition 65's Shelf Labeling Requirement is Pre-empted by the Plain Language of FIFRA and FHSA.

Regardless of whether a particular claim of pre-emption is categorized as express or implied, the "ultimate task in any pre-emption case is to determine whether State regulation is consistent with the structure and purpose of the statute as a whole." *Gade v. National Solid Wastes Management Ass'n*, _____ U.S. at ____, 60 U.S.L.W. at 4590. If the language and structure of a federal enactment clearly limit a State's ability to regulate, pre-emption must be found. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-153 (1982).

Thus, the Court need go no further than a simple analysis of FIFRA and FHSA to find pre-emption. Shelf labeling regarding product content is clearly "other written, printed or graphic matter." The warnings accompany the product as they are present at the point-of-sale. *See Kordel v. United*

States, 335 U.S. 345 (1948) (supplemental literature constitutes labeling under the federal Food Drug & Cosmetic Act). The Proposition 65 warnings therefore constitute labeling for the purposes of FIFRA and FHSA, and are pre-empted.

The content of Proposition 65 shelf labeling is not dispositive. Because shelf labeling is in addition to and not identical to the federal labels -- a possibility recognized and prohibited by Congress -- the state regulation is pre-empted. The Ninth Circuit decision has the result of holding that material not physically affixed to the container does not constitute labeling -- a result clearly inconsistent with the terms of FIFRA and FHSA and this Court's prior reasoning. The petition for certiorari should be granted to prevent the manifestly inaccurate reading given FIFRA and FHSA by the Ninth Circuit.

B. Even if Proposition 65's Shelf Warnings are Not Labeling, They Have an Adverse Effect on FIFRA and FHSA, and are Pre-empted by Federal Law.

Even assuming that Proposition 65 shelf warnings are not considered labeling pursuant to FIFRA and FHSA, the warning requirement is nevertheless impliedly pre-empted by federal law.

Implied pre-emption has been established by this Court in any number of formulations. The policies and purposes served by the federal law, and implicated by the State enactment, have been dispositive. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The impact of State law on Congress' chosen regulatory method has been considered. *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, 2275 (1990). The degree to which States can diverge from the federal regime has been considered. *International Paper Co. v. Ouellette*, 479 U.S. at 476. The various formulations are all applied in determining whether the State law "stands as an obstacle" to the federal regime, or regulates in a field occupied by the federal law, the two basic standards in

implied pre-emption analysis. *See Cipollone*, ___U.S. at ___, 60 U.S.L.W. at 4706-4707.

The common thread in these apparently different approaches to implied pre-emption analysis is the effect of the state law on the integrity of the federal program or those regulated.[2] *Id.* at ___, 60 U.S.L.W. at 4709-10. As the Eleventh Circuit aptly stated, "it is possible to infer pre-emptive intent solely from effects." *Papas v. UpJohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 60 U.S.L.W. 3870-3871, 3878 (June 29, 1992) (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990)) (emphasis added). In and of itself an "effects" test is not dispositive of a pre-emption claim, but assists in developing the type of information needed to balance the presumption in favor of state law that applies in pre-emption cases. *Cipollone*, ___U.S. at ___, 60 U.S.L.W. at 4706 *(quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In *Morales v. Trans World Airlines, Inc.*, 60 U.S.L.W. 4444 (June 1, 1992), this Court construed the preemptive effect of the Airline Deregulation Act on state guidelines related to airline advertising. In finding that the ADA preempted the state guidelines, the Court looked to the impact of the state rules on the regulated community and the intended reach of the federal law. *Id.* at 4446-47. The poten-

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[2]As the Court has stated, the label applied to pre-emption analysis in a given case may have substantive implications. *Gade* at ___U.S. at ___, 60 U.S.L.W. at 4590. This case, like *Gade*, does not turn on whether pre-emption is express or implied, but indeed on the very effects Congress sought to avoid in adopting a comprehensive labeling regime for consumer chemicals.

tial economic effect of the state guidelines was also important in this analysis.[3]

In the present case, Propostion 65 has a direct, significant impact on the integrity of the FIFRA and FHSA regulatory regimes, as well as substantial impact on chemical manufacturers.

Under Proposition 65, the State of California summarily lists products considered to be carcinogens and reproductive toxins by other organizations, such as the International Association for Research on Cancer (IARC). *Cal. Code Regs.* tit. 22, § 12601. Similarly, proposed regulations will establish an expedited method for setting Proposition 65 regulatory levels. *See Cal-EPA Considering New Method for Setting No Significant Risk Levels*, Chem. Reg. Rep. (BNA) 798 (Sept. 20, 1991). No independent scientific assessment is conducted in the listing process. The summary listing procedures do an injustice to the scientific assessments made pursuant to FIFRA and FHSA.

Crystalline silica is a good example of the absurd results under Proposition 65 which impact the federal labeling programs. IARC has recently listed crystalline silica as a "probable" carcinogen. Crystalline silica is one of the most ubiquitous substances on earth, and constitutes a large percentage of the earth's crust. The common form of the chemical is sand, such as that used in children's sandboxes or in construction applications. The evidence that crystalline silica is a human carcinogen is limited at best. *See, e.g.*, McDonald, *Silica, Silicosis and Lung Cancer* (Editorial), 46 Brit. J. Indus. Medicine 289-91 (1989).

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[3]Notably, the *Morales* decision adopts a broader construction of the preemption provision than would be suggested under the Ninth Circuit's decision below. *See Cipollone*, ___ U.S. at ___, 60 U.S.L.W. at 4715 (Scalia, J., concurring in part and dissenting in part).

The Consumer Product Safety Commission (CPSC), which administers the FHSA, has not issued any requirement that sand for children's use be labeled for its health effects (although it would clearly be within CPSC's purview to do so). At least at this juncture, the CPSC has not determined that sand warrants a warning label about its theoretical health effects.

Proposition 65 will require inflexible warnings of the theoretical carcinogenic effect of sand. In the absence of a FHSA warning, the Proposition 65 warning supplants the CPSC's expertise and judgment. The FHSA labeling program, designed to foster confidence and safety in consumer products nationwide, is undermined, and the public subjected to warnings of negligible risks. Over-labeling creates the risk of triggering information overload, de-emphasizes true risks, and is ultimately harmful to health and safety.

Not only does Proposition 65 undermine the role of science and the role of the federal agency in regulatory decisions, the California law has a clear impact on interstate commerce. Congress' choices in FIFRA and FHSA reflect an implicit balancing between health and safety needs and interstate commerce. As well noted in the petition for certiorari, the Ninth Circuit decision has a clear effect on interstate commerce. *Pet. for Cert.* at 16-17, 26-27. Other states may be persuaded to adopt similar or inconsistent regulations following a broad grant of authority like that contained in the Ninth Circuit holding. The resulting distortions of the federal labeling system, and health and safety protection, are exactly the effect Congress sought to prevent with uniform labeling requirements under FIFRA and FHSA.

Contrary to the Ninth Circuit's decision, the State law need not be inconsistent with the federal law in order to infer pre-emption. *Morales*, ___ *U.S. at* ___, 60 U.S.L.W. at 4447; *Mackey v. Lanier Collection Agency and Service, Inc.*, 486

U.S. 825, 829 (1988) (pre-emption of state retirement law that was arguably consistent with federal law). It is enough that the state law impact the federal program in some way.

Even where the state and federal programs share a common goal, pre-emption may be found. In *Gade*, compliance with both the federal and state law was possible. ____U.S. at ___, 60 U.S.L.W. at 4591. The fact that the State regulation had another purpose arguably within the State's police powers (hazard communication to the public) was not dispositive. *Id.* The effect of the State regulation on the administration of the federal occupational safety and health program, and on the regulated industry, controlled.

The decision of the Ninth Circuit that the regulated community can comply with both Proposition 65, and FIFRA and FHSA, is plainly at odds with the decisions in *Morales*, *Gade* and *Mackey*. *See Chemical Specialties Manufacturers Ass'n . v. Allenby*, 958 F.2d at 948-949. Although the Ninth Circuit was correct to look at compliance as a factor in determining the effect of Proposition 65's labeling requirement, that factor alone does not decide the pre-emptive effect of federal law on state law. Proposition 65 clearly has an impact on the federal regulatory structure for consumer chemicals, and implicates interstate commerce. The petition for certiorari should therefore be granted.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH DECISIONS IN OTHER FEDERAL COURTS OF APPEAL

The Ninth Circuit's decision employed no careful analysis of the structure or purpose of FIFRA, or of the effect of the State enactment on Congress' chosen regulatory scheme. The Ninth Circuit decision simply and superficially transforms all FIFRA and FHSA pre-emption questions into a narrow review of what constitutes labeling. The Court should grant certiorari to provide guidance to States, the regulated community, and the lower courts on the FIFRA and FHSA preemption standards.

New York State Pesticide Coalition v. Jorling, 874 F.2d 115 (2d Cir. 1989) provides an example of an analysis starkly at odds with the Ninth Circuit decision. *Jorling* involved a state requirement that pesticide applicators provide public notice of their activities. According to the Second Circuit, the notices provided by professional pesticide applicators were not labeling, but rather a notification program. *Id.* at 119. By contrast, Proposition 65 shelf labeling falls more readily into the labeling area in which State activity is prohibited; shelf labeling has a closer relationship to products than the conditions for chemical use. *Id.*

The Second Circuit held that FIFRA did not pre-empt the state use regulation. The *Jorling* Court had a clear understanding that labeling necessarily must be considered in the relevant circumstances. *Id.* at 119. The *Jorling* Court did nothing to disturb the understanding that the federal government had exclusive authority over labeling, or that state regulation may have have a negative effect on the FIFRA regulatory regime. *Id.* at 118-119. *See also New York Pesticide Coalition v. Jorling*, 704 F. Supp. 26, 29-30 (1989).

This Court has clearly indicated that local and state regulation of labeling would fall within the area pre-empted by FIFRA. *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). The Court distinguished local use permit regulations from labeling: "local use regulations -- unlike labeling or certification -- do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses". *Id.* at 2487. Proposition 65 shelf warnings are clearly not use restrictions of the type approved in *Jorling* or *Mortier*, but are in fact labeling.

The Eleventh Circuit has also expressed a view on FIFRA pre-emption, holding that FIFRA impliedly pre-empts state common law tort claims for inadequate labeling. *Papas v. Upjohn Co.*, 926 F.2d at 1021. This view is shared by the Fourth and Tenth Circuits. *Worm v. American Cyanamid Co.*,

___ F. 2d ___, 1992 U.S. App. LEXIS 14154 (4th Cir. 1992); *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 959 F.2d 158 (10th Cir. 1992).

Common law tort judgments have as much of a regulatory effect as any other form of state enactment. *Cipollone*, ___*U.S. at* ___, *60 U.S.L.W. at 4708 (plurality opinion). See International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986). The Eleventh Circuit decision found that to the extent a tort judgment can be seen to impose a labeling requirement, FIFRA pre-empted the action. *Papas*, 926 F.2d at 1021.

Although this Court has recently remanded the *Papas* case to the Eleventh Circuit for further consideration in light of *Cipollone*, 60 U.S.L.W. 3878 (June 29, 1992), the prior decision recognized the strong federal role in FIFRA: "The statute's language, by itself, is a powerful limit on state power over labeling." *Papas*, 926 F. 2d at 1023. In sharp contrast, the Ninth Circuit decision has the effect of approving all state regulation regardless of its impact on the federal labeling programs. Because of the potential for confusion arising from the various circuit court views, the petition for certiorari should be granted.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari filed by the Chemical Specialties Manufacturers Association should be granted.

Respectfully submitted,

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APPENDIX

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July 6, 1992

Michael P. Walls, Esq.
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Re: Chemical Specialties Manufacturers Association v. Allenby, No. 91-1957

Dear Mr. Walls:

On behalf of the Chemical Specialties Manufacturers Association, we hereby consent to the filing of an amicus curiae brief by the Chemical Manufacturers Association in support of the Petition for a Writ of Certiorari.

Sincerely,

Lawrence S. Ebner
Attorney for Chemical Specialties Manufacturers Association

cc: Stephen S. Kellner, Esq.

LSE:py

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June 29, 1992

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RE: Chemical Specialties Manufacturers Ass'n v. Allenby;
Petition for Certiorari (Supreme Court No. 91-1957)

Dear Mr. Walls:

Respondents consent to the Chemical Manufacturers Association filing an amicus brief in support of the Petition for Certiorari in this matter.

Sincerely,

DANIEL E. LUNGREN
Attorney General

EDWARD G. WEIL
Deputy Attorney General

cc: Charles O'Connor, III (Attorney for Petitioner)